Texas Supreme Court Sounds Death Knell for *Melody Home* Implied Warranty

By Mark Feller*

In *Olshan Found. Repair Co., LLC v. Gonzales*, the Supreme Court of Texas held that the implied warranty of good and workmanlike repair, "the *Melody Home* warranty," may be superseded by an express warranty. The court also held that once a consumer has some knowledge that a service provider is performing poorly, the consumer's Deceptive Trade Practices Act (DTPA) claim accrues and must be filed within two years of that date to avoid being barred by the statute of limitations. These holdings have broad implications in the consumer litigation field.

Foundation of the Case

Nelda Gonzales and her former husband purchased a home in 1996.[1] In June 2001, she noticed cracking on the interior and exterior of her home.[2] A month later, she hired Southwest Olshan Foundation Repair, who installed 45 cable-locked pilings to remedy the problem.[3]

In April 2002, Gonzales noticed doors and windows sticking, Olshan returned and determined that this was caused by leaking plumbing.[4] In March 2003, Olshan dug tunnels, while a plumbing company repaired the leaks.[5] In October, Gonzales refused to let Olshan fill in the tunnels and re-level the home because one of their employees told her that "Olshan was not doing a good job," it was "the worse job I ever seen," and her home "had not been fixed."[6] Olshan sent engineers on November 2003 and July 2005 to investigate the foundation.[7] On both occasions the engineers told her that the foundation was functioning properly.[8] Nearly a year after the second inspection, Gonzales's attorney hired an engineering firm to inspect the foundation, the firm determined the foundation's pilings were not working.[9]

In June 2006, Gonzales sued Olshan for fraud, breach of express warranty, breach of implied warranty of good and workmanlike repair, and DTPA laundry list violations.[10] A jury failed to find there was a breach of express warranty, but found in favor for Gonzales on the implied warranty, fraud, and DTPA claims.[11] The trial court ordered Olshan to pay Gonzales $101,000 in damages, $10,127 in engineering fees, and $80,000 in attorneys' fees.[12]

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The Decision Below: The Statute of Limitations Bars Gonzales's Claim

The San Antonio Court of Appeals, sitting *en banc*, reversed the trial court's findings and rendered a take-nothing judgment in favor of Olshan.[13] In arriving at their decision, the appellate court first addressed Olshan's argument that the statute of limitations barred her DTPA and implied warranty claims.[14] At appeal Olshan argued that the DTPA two-year statute of limitations applied to Gonzales's implied repair warranty claim. Gonzales argued that because she did not bring the warranty claim under the DTPA, therefore the common law four-year statute of limitations applied because it was a construction claim.[15] The appellate court applied the two-year limitations period, concluding that the *Melody Home* warranty arises only under the DTPA.[16] The court did not affirmatively state that there is no common law implied warranty for repair services, but did cite approvingly to case law that supports the contention.[17]

After determining the two-year limitations period applied, the court decided when the period began to run, analyzed the discovery rule, and discussed the fraudulent concealment doctrine, which suspends the statute of limitations.[18] The court concluded that Gonzales admitted in her testimony that she had knowledge of facts, conditions, or circumstances that put her on notice of her injury resulting from Olshan's work prior to receiving her expert's report in 2006.[19]

The court found she was put on notice of the injury, and that the evidence conclusively established that in exercising reasonable diligence she should have discovered Olshan's acts or omissions in October 2003, once an Olshan employee told her the work was not being done properly.[20] The court noted that although she did not know the specific cause or extent of her injury at that time, the injury was "the type that is generally discoverable in the exercise of reasonable diligence."[21] The court held that neither the discovery rule, nor the common law doctrine of fraudulent concealment, nor the 180-day tolling provisions in section 17.565 of the DTPA applied to toll the limitations period.[22] The court of appeals did not address Olshan's remaining issues raised on appeal, including its argument that there was no implied warranty because Olshan provided an express warranty.[23]

The Texas Supreme Court Weighs In: Express Warranty Supersedes Implied

The Supreme Court of Texas granted Gonzales's petition for review and upheld the judgment, albeit on different grounds.[24] The court determined that Olshan's no-evidence objection to submitting the implied warranty claim to the jury preserved the argument that no implied warranty exists.[25] The court held Olshan's express warranty superseded the *Melody Home* warranty; and because the jury found that Olshan did not breach the express warranty, Gonzales's claim was precluded.[26] The court affirmed the appellate court's ruling with regards to the DTPA violations, holding that the statute of limitations period began to run once the employee told Gonzales that Olshan was doing a poor job.[27]

In holding that the express warranty superseded the implied warranty, the court first discussed case law regarding implied warranties.[28] It noted that since its creation, the *Melody Home* implied warranty of good and workmanlike performance could not be disclaimed or waived.[29] But the court noted that a similar warranty, the implied warranty of good and workmanlike construction in the sale of a new home, could be superseded by an express agreement between the parties that sufficiently describes the "manner, performance or quality of construction," because it was a "gap-filler," default warranty.[30] The court concluded that the *Melody Home* warranty is also a "gap-filler" and, therefore, may be superseded if "the parties' agreement sufficiently describes the manner, performance or quality" of the services.[31]

The agreement between Olshan and Gonzales provided two warranties: (1) that Olshan would use a certain system of foundation repair and adjust the foundation for the life of the home and (2) that Olshan would perform the repair in a good and workmanlike manner.[32] Although Gonzales did not sign the warranty, the court looked to it to determine whether Olshan's obligations under the express warranty superseded the implied warranty.[33] The court held that it had superseded the implied warranty because the express warranty language was sufficiently descriptive of the work (foundation repair with a Cable Lock system), the manner (good and workmanlike), and how it would perform (that Olshan would make adjustments for the life of the home).[34] Because the agreement superseded the implied warranty, the implied warranty could not be a basis for the judgment.[35]

The court also affirmed the lower court's finding that Gonzales's DTPA claim was barred by the statute of limitations.[36] The court agreed with the lower court's analysis that Gonzalez knew of the injury in October 2003 when an employee informed her of Olshan's shoddy workmanship.[37] The court further found that the common law doctrine of fraudulent concealment does not toll limitations for DTPA claims, because the legislature did not incorporate it as an exception to the DTPA's limitations period.[38]

The Aftermath: What *Gonzales* Means for Consumer Law

Gonzales is a major turn in Texas consumer law and has broad implications for consumers, service providers, and legal practitioners. Although the decision does not invalidate the *Melody Home* warranty, it does seriously limit its application. Furthermore, the decision exemplifies how expansively the DTPA statute of limitation defense can be interpreted.

The court does not address whether any of the policy reasons for the creation of the implied warranty and how they would be effected as a result of being able to supersede it with an express warranty. The *Melody Home* court gave several policy reasons for why the creation of the repair warranty was necessary.[39] The policies discussed by the *Melody Home* court are especially prescient in *Gonzales* because the homeowner seems to have relied on Olshan's expertise and its assurances that her foundation was functioning properly. The court does not discuss these reasons and analogizes the *Melody Home* warranty to the good and workmanlike construction warranty, declared a "gap-filler" in *Beucher*.[40] However the implied construction warranty was not created based on the same policy reasons.[41] Considering the strong public policy reasons and how they were present in this case, it is surprising the court did not offer a more concrete explanation for why the *Melody Home* warranty is just a "gap-filler."

When the court created the implied warranty in *Melody Home*, it extensively discussed why it could not be waived nor disclaimed.[42] The court noted that if it were to allow such waivers, they would become commonplace in adhesion contracts, yet consumers would continue to expect repair providers to perform adequately regardless of the fine print disclaimer.[43] This would allow repair providers to circumvent this expectation and encourage shoddy workmanship.[44] The court in *Gonzales* does not discuss this worry, and in fact created a rule that will likely result in precisely the situation feared by the court in *Melody Home.* Following the decision in *Gonzales,* service providers must simply include a few lines of "express warranty" language in their adhesion contracts to supersede the implied warranty of good and workmanlike performance.

The supreme court's discussion of the statute of limitations is also worrisome for consumers. After *Gonzales*, once a consumer has minimal knowledge of a potential injury her DTPA claim accrues, despite what they are told by professionals. The court found accrual began when Gonzales knew of her injury and Gonzales receipt of information that Olshan was performing poorly was equivalent to knowledge that her foundation was damaged.[45] Yet, the court does not discuss why Gonzales should have known of the injury to her foundation in October 2003, when Olshan engineers inspected the foundation in early 2004 and mid-2005 and told her both times that it was functioning properly.[46] Apparently Gonzales, an ordinary homeowner, should have been able to discover a complex foundation problem before competent engineering professionals were able to, assuming Olshan's engineers were competent and not misleading her. The court's broad definition of knowledge, for statute of limitations purposes, seems to defeat the legislature's intent for the DTPA to be liberally interpreted and applied to protect consumers and provide efficient, economical procedures to secure such protection.[47] Rather this decision encourages consumers to prematurely rush to the courthouse once they have an inkling their service provider is performing poorly or has injured their property to avoid being barred by the statute of limitations, rather than urging them to resolve problems outside the court room.

Whether *Gonzales* is a reasonable limitation on *Melody Home*, good public policy, or congruent with legislative intent, it is now the law and it is important for consumers, service providers, and consumer law practitioners. This decision should act as a motivating factor to encourage consumers to fully inform themselves on whether they are entering into or currently under a contract that includes an express warranty that covers repair services. Consumers should also contact an attorney as soon as they think their service provider is not performing adequately or that they may be otherwise injured and begin pre-suit discovery as soon as possible to avoid being barred by the two-year statute of limitations. Repair service providers may now limit their potential liability from implied warranty claims by providing an express warranty that specifies the manner, performance, and quality of the repair work to be done. Most importantly, attorneys who represent service providers or consumers in DTPA litigation should be aware of statute of limitation problems and plan accordingly.

Unanswered Questions

Several questions remain in the wake of the *Gonzales*. For one, the court does not discuss whether there is a minimal level of quality that must be included in the express warranty, nor does it give a hint as to when an express warranty need is sufficiently descriptive. Lower courts will deal with these questions, but in the words of the court, as long as the express warranty "sufficiently describes the manner, performance, and quality of the work to be performed," it will supersede the *Melody Home* warranty.[48]

Another unanswered question that remains after *Gonzales* is whether a *Melody Home* warranty claim may be brought outside the DTPA. Because the court concluded the implied warranty claim failed without relying on the limitations defense as the appellate court did, they did not need reach the issue.[49] Although some appellate courts have found that no implied repair warranty claim exists at common law, while one appellate court and the Fifth Circuit Court of Appeals has found inapposite; the court left the question for another day.[50] Because the DTPA does not create warranties and warranties actionable under the DTPA "must be recognized by the common law or created by statute;"[51] it would follow that the *Melody Home* warranty does still exist at common law.

Finally, the *Gonzales* court fails to note or discuss the conflicting jury findings. Although the jury did not find a breach of express warranty, which in part warranted that the repairs would be done in a good and workmanlike manner; they did find

a breach of implied warranty of good and workmanlike repair.[52] This inconsistency may result from the fact that the express warranty contained other specifications, including the free lifetime repair. The court fails to address Gonzales's ability to make a future breach of express warranty claim.[53] This leads to the conclusion that a consumer cannot bring a breach of express warranty claim against a repair provider who gives a lifetime express warranty, regardless of how poorly the repair is performed, as long as they don't refuse to perform further repairs. This may result into consumers being stuck with a poorly performing repair company without recourse.

Conclusion

Gonzales demonstrates the Texas Supreme Court's reluctance to entertain implied warranty claims, and its readiness to allow parties to structure their legal relationship. It also shows that consumers and their attorneys must be diligent in prosecuting DTPA claims, lest they lose the opportunity because of they waited over two years after they had "learned" of their injury. The decision leaves some questions unanswered that will ultimately be worked out by the lower courts. One thing is certain, if service providers take advantage of the language in *Gonzales,* the *Melody Homes* warranty will become a shell of its former self.

* University of Texas School of Law, Class of 2014.

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1 *Sw. Olshan Found. Repair Co., LLC v. Gonzales*, 345 S.W.3d 431, 434 (Tex. App.—San Antonio 2011) *aff'd*, 11-0311, 2013 WL 1276033 (Tex. Mar. 29, 2013).
2 *Id.*
3 *Id.* at 435.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Olshan*, 345 S.W.3d 435-36.
8 *Id.* at 435-36.
9 *Id.* at 436.
10 *Id.*
11 *Gonzales v. Sw. Olshan Foundation Repair, LLC*, No. 11–0311, 2013 WL 1276033 at *2 (Tex. Mar. 29, 2013).
12 *Id.*
13 *Id.* at 442.
14 *Id.* at 436.
15 *Id.*
16 *Id.* at 437.
17 *See id.* (citing cases). The court did not address this issue, noting in footnote 12, "In light of our determination that the express warranty superseded the implied warranty here and bars Gonzales's implied warranty claim, we need not reach Gonzales's argument that the implied warranty is actionable at the common law, in addition to the DTPA."
18 *Id.*
19 *Id.* at 438.
20 *Id.*
21 *Id.* at 439.
22 *Id.* at 439-40.
23 *Id.* at 442, n. 3.
24 *Gonzales*, 2013 WL 1276033 at *1.
25 *Id.*
26 *Id.* at *2.
27 *Id.* at *4.
28 *Id.* at *3.
29 *Id.* (citing *Melody Home Mfg. Co. v. Barnes*, 741 S.W. 2d 349, 354 (Tex. 1987)).
30 *Id.* (citing *Centex Homes v. Buecher*, 95 S.W.3d 266, 273-74 (Tex. 2002)).
31 *Gonzales*, 2013 WL 1276033 at *3.
32 *Id.*
33 *Id.*
34 *Id.* at *4.
35 *Id.*
36 *Id.*
37 *Id.* at *5.
38 *Id.*
39 *Melody Home*, 741 at S.W.2d at 353-54 (the four major policy reasons were: (1) the public interest in protecting consumers from inferior services, (2) service providers are in a better position to prevent loss than consumers, (3) consumers should be able to rely upon the expertise of the service provider; and (4) a service providers are better able to absorb the cost of damages associated with inferior services, through insurance and price manipulation).
40 *Gonzales*, 2013 WL 1276033 at *3.
41 *Compare id.*, *with Humber v. Morton*, 426 S.W.2d 554, 561 (Tex. 1968) (abandoning the rule of caveat emptor because it did not meet the demands of justice and home purchases are important, once-in-a-lifetime transactions for families).
42 *Melody Home*, 741 S.W.2d at 355.
43 *Id.*
44 *Id.*
45 *Gonzales*, 2013 WL 1276033 at *5.
46 *Id.* at *2.
47 Tex. Bus. & Com. Code Ann. § 17.44 (West 2011)
48 *Gonzales*, 2013 WL 1276033 at *4. Interestingly, in the instant case, the express warranty was to perform in a "good and workmanlike manner." The court fails to discuss how a jury could find a breach of the implied warranty of good and workmanlike performance, and not a breach of the express warranty to perform in a good and workmanlike manner.
49 *Id.* at *6, n. 9.
50 *Id.*
51 *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995)
52 *Gonzales*, 2013 WL 1276033 at *2.
53 *See id.* at *6, n. 3 (citing *PPG Indus., Inc. v. JMB/Houston Centers Partners Ltd. P'ship*, 146 S.W.3d 79, 96 (Tex. 2004)).